Supreme Court, U.S.
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No. 94-565

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYNN ATHMANN, JEFF DEUTSCH,
MICHAEL DONOVAN, ROBERT KROGSENG,
JAMES LOMER, MICHAEL McCARTHY,
SAMUEL DAVID REAL, TIM ROUTEN,
ANDREW TOOYAK, JR., and HANNS WEISS,

Petitioners,

vs.

NORTH SLOPE BOROUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN REPLY

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ARGUMENT

A. Employer Admissions of Recordkeeping Violations are not "Hypothetical."

North Slope Borough ("NSB") has blatantly distorted the record and the undisputed facts in this case to avoid review by the United States Supreme Court. NSB is well aware that the principal officers and superiors of NSB Department of Public Safety knew and admitted that police officers in the remote villages of northern Alaska were not working 9 to 5 jobs five days a week. Nonetheless, NSB payroll records depicted just such a regular hourly workday. NSB had officers sign blank time sheets -- with the certification that these blank time sheets were "actual hours worked" and "true and correct." Later, sergeants filled in a "7.5" numerical for hours of actual work on five consecutive days a week on the time sheet and then signed their names certifying that these hours were "true and correct."

Deputy Director Marshall admitted that the whole scheme of NSB in its payroll time keeping for village officers was misleading and misstated officers' work hours in the village. **RT V. 207** Even NSB's statement at page 3 in its opposition brief to this Court that: "[l]aw enforcement activities in the small villages occur on a peaks and valleys basis," is belied by NSB's time sheets which list officer hours at a level 7.5, 7.5, 7.5, 7.5, and 7.5 straight across for five consecutive days with two blank days for alleged weekends off. There is no peak nor any valley in NSB's certified payroll timesheets for village officers. Nonetheless, NSB represents to this Court that timekeeping violations addressed in the police officer's briefing are only "hypothetical."

At trial, by obtaining a court ruling which did not require the burden of proof to be shifted to NSB and which allowed the issue of recordkeeping violations to go to the jury, NSB obtained a premium from its lax recordkeeping practices. NSB has enjoyed some measure of success both at trial to the jury and on appeal by arguing that any record keeping violations were only "hypothetical," "hypertechnical," "do not matter a blip." First, the verdict form allowed the jury to decide that payroll records were substantially accurate and that therefore the plaintiff police officers had not "proved" uncompensated work.[1] Next, the Ninth Circuit Court of Appeals refused to address the clear and undisputed recordkeeping violations of NSB. Without any analysis or recitation of evidence, the decision merely affirmed the jury nullification of the admitted recordkeeping violations as being within the clear weight of the evidence. This was error.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), this Court addressed the issue of what should occur when an employer has failed to keep the adequate and accurate records required by the FLSA. The Court observed that in the normal case the employee has the burden of proving that he or she has performed work for which either he or she has not been properly compensated. When the employer has kept the proper and accurate FLSA records, then the employee may easily

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[1] NSB implies that because Plaintiffs participated in proposed and joint jury instructions that error is waived. Since the court had ruled that the issue of recordkeeping would go to the jury, plaintiffs resulting participation in crafting jury instructions cannot be deemed a waiver.

meet that burden by securing production of those records. Id. at 687.

The Court then noted, however, that a problem of proof is created when an employer, such as NSB, has no accurate records of time worked. In the case at bar, the payroll records of NSB showed nothing which even closely approximated an actual work day, week or month of the police officers in the villages. Even deputy director Marshall confessed that the records were false and misleading.

> Q: And isn't it true that the Department of Public Safety knew that the whole system was false and misleading?
>
> A. I think that's probably fair.
>
> Q. And isn't it also true that an inaccurate payroll system is a very effective way to make it difficult for employees to make a claim under the Fair Labor Standard Act?
>
> A. That I don't know. I would just be speculating.

(RT V 207)

Faced with a similar problem, this Court in *Anderson*, stated that the solution is not to penalize the employee and reward the employer by denying the employee recovery for any failure of proof of the extent or amount of uncompensated time. See, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. at 687. Instead, the court below designed a solution whereby even though the undisputed evidence demonstrated that records were improper or

inaccurate and even though the employees had estimated the extent of uncompensated work performed, the burden of proof did not shift to NSB, the party that failed to meet the recordkeeping requirements of FLSA. Here, because recordkeeping accuracy was held to be at issue, police officer estimates were held insufficient to prove that uncompensated work was performed. This "solution" is in conflict with this Court's decisions and the decisions of other circuit courts of appeal.

In this case, not only did the trial court allow the jury to consider whether there were recordkeeping violations, despite the undisputed evidence of such violations, the jury was instructed to hold the employee to the requirement to prove uncompensated work with specificity and also show that NSB had suffered or permitted such uncompensated work to be performed. Credible officer estimates and recollections were not entitled to any weight because the jury had ruled that no recordkeeping violations had occurred. Once the NSB was allowed to rely upon its fraudulent time sheets as convincing averages or acceptable substitutes for accurate payroll records, the solution was to penalize the employee and deny him or her any recovery because he or she could not prove the precise extent of uncompensated work.

This Court's review is necessary if only to confirm the integrity of the FLSA. NSB's opinions and assertions notwithstanding, recordkeeping requirements of the FLSA do matter a "blip." This Court's review is required to confirm that merely because it is difficult to maintain accurate records, merely because it was more administratively convenient to falsify time records, merely because NSB did not want to pay overtime does not excuse the recordkeeping requirements of the FLSA.

Otherwise, employers with workers in remote sites -- such as park rangers, Montana State Troopers, and oil riggers on rigs at sea -- can avoid the law.

B. NSB's Flextime Policy Is Illegal As A Matter Of Law Because It Is A Pretend Work Schedule to Avoid Overtime

NSB contends that the FLSA permits a "flexible" work schedule such as its flextime system. In any event, NSB argues, there is nothing in FLSA that specifically prohibits it. Officers will respond to both these legally flawed arguments.

NSB's flextime policy bears not even a passing resemblance to the flexible work schedules or fluctuating work weeks permitted by the case law and the Department of Labor regulations. The fixed salary for a fluctuating work week permitted by federal regulation 29 C.F.R. § 778.114 encompasses an employment contract that guarantees the employee will receive an average hourly wage of at least minimum wage. See *Spires v. Ben Hill County*, 754 F.Supp. 690, 702-704 (M.D. Ga. 1990) where 29 C.F.R. § 778.114 held not to apply since there was no proof of mutual understanding of terms. This is an employment contract or relationship that encompasses a very specific work assignment and specific exception to the wage and hour regulations. The concept anticipates a fixed salary that on a fluctuating work week will always result in the payment of that salary including overtime premium. NSB would be hard pressed to point to any evidence in the record that officers going on and off the clock each hour of the day or night at no set hour is work at a "fluctuating work week" as contemplated by the regulations. Additionally, at no time was any individual officer guaranteed to

receive some fixed salary, including some agreed upon premium pay.

These concepts and exceptions offered by NSB under the federal regulations have no application here and NSB's counsel knows it. It was undisputed by NSB that officers were hourly employees and were not paid a fixed salary. Officers were not paid a salary that included time and a half regardless of the hours worked, and officers were not paid for hours worked in excess of the fluctuating work schedule. Flextime in the traditional sense of a short work week at set number of reduced hours one day followed by set number of increased hours on the next day is the flexibility allowed by the FLSA. NSB's argument that this flexibility somehow sanctions its bastardized sense of flextime is specious.

NSB's argument that there is no specific provision of the FLSA which prohibits its flextime policy is sophistry. This Court has repeatedly condemned violations of the FLSA which involve employer artifices designed to avoid the statutory requirements and minimum overtime compensation requirements of the FLSA. In *Walling v. Helmerich & Payne*, 323 U.S. 37 (1944) this Court condemned as a violation of the FLSA an employer's novel split-day plan of computation of work shifts as an "ingenious mathematical manipulation" which was designed to ensure that total wages paid to an employee would remain the same despite the provisions for overtime in the Act. Id. at 41. The Court found that the arbitrary division of an employee's daily shift or tour of duty into two parts setting one as base rate and the other as overtime was an unrealistic and artificial scheme to negate the statute's purpose. Id. In finding that such an ingenious and creative plan was in violation of the principles of the Act, the Court stated:

> Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

Id. at 42. Similarly NSB has used ingenuity and creativity to take avoidance of the overtime provisions of the FLSA to a heretofore unreached plane.

NSB's reliance on *Mullins v. Howard County Maryland*, 730 F.Supp. 667 (D. Md. 1990) for the proposition that the FLSA permits flexible work schedules is misplaced. In *Mullins*, the court was dealing with fixed straight time payments over a period of time, including fixed overtime payments, which resulted in all overtime and straight time hours being paid. Nonetheless the court specifically noted that:

> Under the FLSA, averaging the straight time payments is permissible. The only requirement for straight time payments is that the work period must remain fixed regardless of how many hours of straight time are actually worked. See e.g. 29 C.F.R. § 553.224 (1989). (emphasis added).

Id. at 670. Even NSB would acknowledge that its officers had no fixed work period.

The regulations contemplate a flextime schedule which contains a later or earlier start time which meets an employee's personal or educational demands outside the work place. Instead, NSB set no fixed work schedule other than three hours during five days out of any single week. Other than those 15 hours, there was no "tour of duty," there was no scheduled work. Officers were ordered to stretch the remaining 35 hours of a 40-hour

work week over 24-hour days, 7-days a week. Work performed late at night for 5 or 6 hours was to be traded out in 15 minute, 20 minute, 40 minute or hour intervals of undisclosed and unrecorded "quiet time" occurring at indefinite and unknown times during whatever time remained in the work week.

The NSB system offset hours that might have been normal work hours with hours of undesirable work time with no attempt on the part of NSB to track or record when such hours of work were accomplished. The whole purpose of this scheme was to obtain 24-hour law enforcement presence in villages without being faced with the budgetary realities of paying overtime for such police coverage. As such, NSB is being disingenuous with this Court by contending that this "stretch time" policy of NSB was merely a specific fact issue involving flexible work schedules otherwise permissible under the FLSA.

C. The Questions Raised In This Case Go Beyond The Interest Of Only The Parties

NSB quotes out of context the police officers' characterization of NSB's stretch time work policy as a "novel and unique" payroll system. It is only within the context of the traditional notions of a flextime work schedule, which are supposed to benefit a worker's personal and educational demands, that the NSB's flextime policy is novel and unique.

In one very important sense, NSB's policy is neither unique nor novel. NSB is currently using its flextime policy to employ its current compliment of public safety officers in villages on reduced staffing requirements of one or at most two officers in a village. It still wants 24 hour police coverage with little or no overtime accrued

by these officers. Moreover, NSB is one of the larger public employers in the State of Alaska employing one of the largest work forces. NSB, in its opposition to review, is unabashed in its confidence in the use of its peculiar flextime work schedules for its officers or arguably for any of its other service delivery employees in these remote villages. With the sanction of the federal courts, NSB's flextime policy will be a model for delivery of police and other public services to remote and rural communities in Alaska or any other state with vast open spaces.

Finally, as long as NSB feels confident in the use of its flextime policy to stretch officer time in remote villages, NSB will not hire additional officers to provide the law enforcement protection and 24-hour coverage that village residents of the NSB have come to expect and deserve. NSB will simply replenish burned out officers (as it did with the seventeen officers involved in the lawsuit) with new recruits and the NSB flextime system will continue unchanged. Only review by this Court will convince both the elected officials and the Director Department of Public Safety that it is necessary to provide enough officers to village assignments as the only legitimate alternative to paying overtime. This is precisely the purpose of the FLSA -- a purpose that was frustrated and violated at trial in this case.

CONCLUSION

Each officer estimated his or her actual hours of uncompensated overtime, assuming that flextime did not offset those hours worked during alleged quiet times in the normal 8 - 5 day. Petitioning officers estimated their hours of uncompensated overtime at trial with a specific

total number of hours. Under *Mt. Clemens*, this proof was sufficient to meet each officer's minimal burden to shift to NSB the duty to come forward with evidence of precise hours worked. NSB did not even attempt such proof but instead attacked the unreasonableness of the officers failure to live and work by its flextime procedures. This Court should reverse and remand for an order entering judgment for each of these officers at the amount of each one's estimated overtime hours.

DATED this 1st day of November, 1994.

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Code of Federal Regulations

29 C.F.R. § 778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these week sis approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.62).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short

ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he received for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.